

based primarily on two news articles that appeared on August 31 and September 4, 2012. Both articles were written by a *Bloomberg BusinessWeek* reporter who duplicitously gained entry to a private meeting hosted on August 30 by American Crossroads. While this meeting was widely reported among the Washington political press, no individual or organization used it as the basis of a complaint in the following months – until now. The reason is quite obvious: the article is only of political interest, and it reveals no wrongdoing.

Many of the “facts” that CREW alleges in support of its case do not actually appear in any of the cited materials, nor are they otherwise substantiated. Rather, CREW draws many inferences that are simply not true, and the Complaint is replete with speculation. Many of CREW’s conclusory statements are not reasonably drawn. Finally, several claims made in the Complaint – including claims regarding the state of mind of unknown persons – are so obviously fabricated that it is almost certain that Ms. Sloan and Ms. Markley falsely swore to the Verifications submitted with their Complaint.

CREW’s Complaint should be quickly dismissed and CREW admonished for, once again, filing an abusive, harassing, and baseless Complaint. We also request that Ms. Sloane and Ms. Markley be referred to the appropriate authorities for investigation into whether either or both violated 18 U.S.C. § 1001 when they executed their respective Verifications and submitted this Complaint.

I. Questions Presented

Despite the length of the Complaint, the relevant questions raised are quite simple. Does the Complaint present credible and unrebutted evidence demonstrating that Crossroads GPS (i) solicited or received funds that were provided by a donor “for the purpose of furthering the reported independent expenditure” and (ii) then failed to properly report those contributions?

As explained below, CREW’s complaint does not satisfy the reason to believe standard set forth in MUR 4960 (Hillary Clinton), nor does it provide any evidence of a substantive violation of the law. For either or both reasons, the Complaint should be dismissed.

II. “Reason To Believe” Standard

The Commission has previously explained:

The Commission will make a determination of ‘no reason to believe’ a violation has occurred when the available information does not provide a basis for proceeding with the matter. The Commission finds ‘no reason to believe’ when the complaint, any response

filed by the respondent, and any publicly available information, when taken together, fail to give rise to a reasonable inference that a violation has occurred, or even if the allegations were true, would not constitute a violation of the law. For example, a 'no reason to believe' finding would be appropriate when:

- A violation has been alleged, but the respondent's response or other evidence convincingly demonstrates that no violation has occurred;
- A complaint alleges a violation but is either not credible or is so vague that an investigation would be effectively impossible; or
- A complaint fails to describe a violation of the Act.

Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,546 (March 16, 2007).

"'Reason to believe' is a threshold determination that by itself does not establish that the law has been violated. In fact, 'reason to believe' determinations indicate only that the Commission found sufficient legal justification to open an investigation to determine whether there is probable cause to believe that a violation of the Act has occurred." Statement of Reasons of Commissioners Bauerly and Weintraub in MUR 6056 (Protect Colorado Jobs, Inc.) at 2; *see also* Statement of Reasons of Commissioner Walther in MUR 6570 (Berman for Congress) at 9 ("A 'reason to believe' finding is not a finding that a respondent violated the Act, but instead simply means that the Commission believes a violation may have occurred.").

"In order for the Commission to determine that a complaint provides a reason to believe a violation occurred, the complainant, under penalty of perjury, must provide specific facts from reliable sources that a respondent fails to adequately refute." Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn in MUR 6056 (Protect Colorado Jobs, Inc.) at 6. Taking into account the complaint, the sources of the allegations, and the response(s), Commissioners may ask if there is "sufficient information to find *no* reason to believe a violation occurred," or whether discrepancies or unanswered questions "raise[] sufficient questions to warrant further inquiry." Statement of Reasons of Commissioners Bauerly and Weintraub in MURs 6051 and 6052 (Wal-Mart Stores, Inc.) at 2.

"Unwarranted legal conclusions from asserted facts ..., or mere speculation ... will not be accepted as true. In addition, while credibility will not be weighed in favor of the complainant or the respondent, a complaint may be dismissed if it consists of factual allegations that are refuted with sufficiently compelling evidence provided in the response to the complaint [P]urely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find reason to believe that a violation of the FECA has occurred." Statement of Reasons of Commissioners Mason, Sandstrom, Smith, and Thomas in MUR 4960

(Hillary Clinton) at 2-3.² “[M]ere ‘official curiosity’ will not suffice as the basis for FEC investigations.” *FEC v. Machinists Non-Partisan League*, 655 F.2d 380, 388 (D.C. Cir. 1981).

“[U]nder the Act, before making a reason to believe determination, the Commission must assess both the law and the credibility of the facts alleged. To do so, the Commission must identify the sources of information and examine the facts and reliability of those sources to determine whether they ‘reasonably [give] rise to a belief in the truth of the allegations presented.’ Only once this standard is met may the Commission investigate whether a violation occurred.” Statement of Reasons of Vice Chair Hunter and Commissioners McGahn and Petersen in MUR 6296 (Kenneth Buck) at 5-6

As discussed in more detail below, the Complainant’s allegations warrant a “no reason to believe” finding and should be dismissed. The evidence presented in the Complaint does not show any violation of the law. The specific “facts” cited by CREW that allegedly demonstrate the violation are based entirely on incorrect inferences and assumptions that CREW refers to as its “information and belief.” That “information and belief,” however, is maliciously wrong – as opposed to being merely mistakenly wrong. CREW simply makes up critical “facts” for which there is absolutely no evidentiary basis.

CREW’s general lack of credibility as a legitimate “watchdog”³ and its history of filing frivolous complaints with the Commission should also be taken into account when weighing the reliability of the allegations made. Coupled with the Respondents’ correction of the record that CREW presents, and the specific refutations of the “facts” that CREW alleges, the Commission should have no difficulty dispensing with this matter. There is more than “sufficient information

² See also Statement of Reasons of Vice Chair Hunter and Commissioners McGahn and Petersen in MUR 6296 (Kenneth Buck) at 6 (“As in MUR 4960 (Hillary Clinton), the complaint in this matter lacked specific facts to establish that Buck, his authorized committee, and Morgensen violated the Act. Instead, the complaint was based ‘upon information and belief,’ a phrase that appears at least once on every page. None of the allegations were based on personal knowledge and, with two exceptions, the complaint does not identify any source for its allegations, credible or otherwise. Moreover, Respondents sufficiently refuted the factual allegations made in the complaint. Thus, the Commission is required under the statute and its own regulations to find no reason to believe Respondents violated the Act.”).

³ See, e.g., Karen Tumulty, “The Hill Monitor,” *Time* (Oct. 23, 2006) (“Since its founding in 2003, CREW has worked through legal and regulatory channels to press allegations of impropriety almost exclusively against Republicans.”) available at <http://www.time.com/time/magazine/article/0,9171,1549301,00.html>; Paul Singer, “Watchdog, Donors Share Common Foes,” *Roll Call* (Jan. 29, 2008) (“a review of entities against which CREW has filed complaints and information about its donors suggests that the organization may be guilty of the same practice — attacking groups and individuals who are the foes of CREW’s donors”) available at http://www.rollcall.com/issues/53_85/-21796-1.html.

to find *no* reason to believe a violation occurred” here. Statement of Reasons of Commissioners Bauerly and Weintraub in MURs 6051 and 6052 (Wal-Mart Stores, Inc.) at 2 (emphasis in original).

III. Discussion of Factual Matters Raised In Complaint

A. The 14 Advertisements Screened

The Complaint wrongly presumes that the advertisements that were screened for attendees at the August 30 meeting were advertisements for which Crossroads GPS was seeking funding. The Complaint alleges: “Crossroads GPS officials solicited the attendees for additional contributions, *apparently* to pay to broadcast the advertisements the potential donors just viewed or to broadcast other ads in those races.”⁴ Complaint at ¶ 28 (emphasis added). This is not the case, and CREW’s speculation on this point is simply wrong.

The following advertisements were screened at the August 30 meeting:

1. American Crossroads, “Behind,” aired on or about June 13, 2012.
(<http://www.youtube.com/watch?v=wrEPOIeA3sY>)
2. Crossroads GPS, “Cost,” aired on or about August 15, 2012.
(<http://www.youtube.com/watch?v=q58ADyndS8w>)
3. Crossroads GPS, “Cheap,” aired on or about July 3, 2012.
(<http://www.youtube.com/watch?v=ajFDqqWhk6Y>)
4. Crossroads GPS, “Get Up,” aired on or about August 23, 2012.
(<http://www.youtube.com/watch?v=IXFzKsuBmM>)
5. Crossroads GPS, “Suffered,” aired on or about August 23, 2012.
(<http://www.youtube.com/watch?v=S2fTu4UHsdI>)

⁴ See also Complaint at ¶ 55 (“Crossroads GPS showed attendees of the August 30, 2012 fundraiser advertisements targeting Democratic Senate candidates in Ohio, Virginia, Montana, Florida, Massachusetts, and Nevada. Several of the ads were produced by Crossroads GPS. *Immediately after the ads were shown, Crossroads GPS solicited contributions from the attendees.* Among other things, Mr. Law noted more money was needed because advertising rates had increased.”); Complaint at ¶ 56 (“On information and belief, *Crossroads GPS received contributions given with the intention that the money be spent on independent expenditures broadcasting the advertisements shown at the fundraiser or broadcasting other ads in the Ohio, Virginia, Montana, and Nevada Senate races.*”) (emphasis added).

6. Crossroads GPS, "Foundation," aired on or about November 9, 2011.
(<http://www.youtube.com/watch?v=iNxez4ddpa0>)
7. Crossroads GPS, "Investigation," aired on or about August 3, 2012.
(<http://www.youtube.com/watch?v=tWY38AvvU98>)
8. Crossroads GPS, "Wake Up," aired on or about July 7, 2011.
(<http://www.youtube.com/watch?v=ESAszBVMnC4>)
9. Crossroads GPS, "Typical," aired on or about December 9, 2011.
(<http://www.youtube.com/watch?v=L3UNOsHgbF1>)
10. Crossroads GPS, "Tried," aired on or about July 12, 2012.
(<http://www.youtube.com/watch?v=spu06VOiT8E>)
11. Crossroads GPS, "News," aired on or about July 31, 2012.
(http://www.youtube.com/watch?v=zkWJrf_x2rA)
12. Crossroads GPS, "Stopwatch," aired on or about June 5, 2012.
(<http://www.youtube.com/watch?v=DnwQAUM8D9E>)
13. American Crossroads, "Smoke," aired on or about July 19, 2012.
(http://www.youtube.com/watch?v=s_AHL5K1XeA)
14. The fourteenth advertisement screened was an advertisement prepared for focus group purposes, and which was never intended for public distribution.

Thirteen of the fourteen advertisements screened at the August 30 meeting **had already been paid for and aired**. These advertisements were not screened as part of an effort to secure funding so that they could be aired, as the Complaint speculates. The fourteenth advertisement was a focus group ad that was not produced for public distribution, and was never aired.

The screened ads were nothing more than examples of advertisements for which American Crossroads (in two cases) and Crossroads GPS (in eleven cases) had already paid and aired.

B. Mr. Rove's Recounting of Conversation With Donor

CREW's limited information regarding Mr. Rove's conversation with a supporter and donor comes from two versions of the same source.

Ms. Kolhatkar's September 4, 2012, article includes the following passage:

As for the closely watched race in Ohio, one of the states that has generated the most political spending by outside groups like American Crossroads, Rove said that he'd had a call from an unnamed out-of-state donor who told him, "I really like Josh Mandel," referring to the Ohio treasurer attempting to unseat Democrat Sherrod Brown. The donor, Rove said, had asked him what his budget was in the state; Rove told him \$6 million. "I'll give ya \$3 million, matching challenge," Rove said the donor told him. "Bob Castellini, owner of the Cincinnati Reds, is helping raise the other \$3 million for that one."

Sheelah Kolhatkar, *Exclusive: How Karl Rove's Super PAC Plays the Senate*, *Bloomberg BusinessWeek* (Sept. 4, 2012).

Subsequently, in an interview with *Democracy Now!*, Ms. Kolhatkar recounted the same comments as follows:

Rove specifically mentioned that he'd had a call from an anonymous benefactor who did not come from Ohio, who came from another state but who was just very interested, and wanted to donate half of their \$6 million budget in the state. So the condition was it had to be a matching challenge. This donor was a big fan of Josh Mandel, who is running against Brown. So Rove mentioned that the owner of the Cincinnati Reds baseball team was helping raise that money.

Sheelah Kolhatkar, *Democracy Now!* Interview, September 5, 2012.

The conversations recounted by Mr. Rove to attendees at the August 30 meeting took place months before, in the spring of 2012. See Affidavit of Karl Rove at ¶ 4. Mr. Rove had at least one other conversation with Mr. Castellini regarding the so-called "matching challenge" in summer of 2012. *Id.* at ¶ 11.

The conversation with the donor who stated, "I'll give ya \$3 million, matching challenge," did not include any discussion of any particular television advertisements, television advertisements in general, or the contents, timing, or targeting of any existing, planned, or

hypothetical advertisements. *See* Affidavit of Karl Rove at ¶ 6. No specific efforts that could or would be made by Crossroads GPS were discussed. *See id.* at ¶ 7. There was no discussion of spending the donor's funds on any specific method of communication. *See id.* at ¶ 8. There was no discussion of independent expenditures. *See id.* at ¶ 9.

At no time did this donor ask, insist, or require that any of the pledged funds be spent in any particular manner or on any particular or specific efforts or projects. *See id.* at ¶ 10. Rather, this donor indicated to Mr. Rove that he was a supporter of Josh Mandel, and offered to donate funds toward Crossroad GPS's budget in the State of Ohio. Mr. Rove understood that the donor intended the pledged funds to be used in some manner that would aid the election of Josh Mandel. *See id.* at ¶¶ 5, 10.

The resulting "matching program" generated approximately \$1.3 million; these funds were not solicited for any purpose other than for general use in the State of Ohio. *See id.* at ¶ 13.

The donor who issued the "matching challenge" never made a single contribution in the amount of \$3 million. Rather, this donor contributed a larger amount to Crossroads GPS that was not in any way earmarked for any particular use. Upon receipt of this contribution, Mr. Rove understood that the donor did not intend the earlier "matching program" to be a formal program, but rather, was simply a way of encouraging Crossroads GPS's general fundraising efforts. *See id.* at ¶ 14.

C. Crossroads GPS 2012 Activity In Ohio

CREW alleges that "Crossroads GPS spent \$6,363,711 on independent expenditures opposing Sen. Brown in the Ohio Senate race." Complaint at ¶ 40. This figure comes from the Center for Responsive Politics' repackaging of FEC data. This total includes only Crossroads GPS's independent expenditures opposing Senator Brown's re-election, and does not reflect Crossroads GPS's total activity within Ohio during 2012, or its "Ohio budget."

Crossroads GPS spent over \$10 million on television advertising in Ohio in 2012 that mentioned one or both of the two candidates in the Senate race. Some of these advertisements were reported to the Commission as electioneering communications or independent expenditures, and those reports are on the public record. Other issue and policy advocacy ads did not fall into either category and were not required to be reported to the Commission. Production costs for these television ads amounted to approximately \$150,000. Crossroads GPS also spent an additional \$240,000 on online (Internet) advertising directed to Ohio residents, and approximately \$43,000 on polling.

CREW's lazy reliance on the work of a third party aggregator yields incomplete information in its Complaint. While the \$6.3 million figure conveniently corresponds to the \$6 million "matching" program that never fully existed, that figure represents only a bit over half of what Crossroads GPS actually spent.

D. Crossroads GPS RFAI Response Dated July 19, 2011

The Complaint makes much of a response to a Request For Additional Information (RFAI) submitted on behalf of Crossroads GPS on July 19, 2011. That response speaks for itself, as does another substantially similar response filed by Crossroads GPS on November 29, 2012, after CREW submitted its Complaint.

Crossroads GPS is fully aware of its FEC reporting and disclosure obligations and has endeavored to satisfy those obligations at all times during its existence. Crossroads GPS has never failed to report contributions required to be reported under the Act and FEC regulations. CREW seeks to cast Crossroads GPS's July 19, 2011, response to a RFAI that should never have been sent as "proof" of a knowing and willful violation of law. As demonstrated in this Response, however, there was no violation of the law, period.

To the extent that the aforementioned RFAI suggests that Crossroads GPS did not satisfy certain disclosure obligations, we reiterate here that the canned language used by the Reports Analysis Division (RAD) badly misstates the disclosure requirement set forth at 11 C.F.R. § 109.10(e)(1)(vi). Rather than simply quote the regulation at issue, RAD uses an incorrect restatement of that regulation.

In June 2011, the Commission sent to Crossroads GPS a RFAI that was immediately available to the public via the Commission's website. That RFAI contained a poor restatement of 11 C.F.R. § 109.10(e)(1)(vi) that very obviously does not track the language of the actual regulation. The media, either intentionally or lazily, misunderstood and misreported both the nature and meaning of the RFAI.⁵ The Commission never made any sort of public correction of this misstatement of law, and the RFAI remains on the public record. RAD has subsequently delivered RFAs featuring the same incorrect language to a variety of entities.

Crossroads GPS's RFAI response was necessitated solely because the Commission publicly distributed a misstatement of the law, which has gone uncorrected. Now, the phony "watchdogs" at CREW believe they have found a way to turn Crossroads GPS's correction of the

⁵ See, e.g., Alex Roarty, FEC Asks Crossroads to Reveal Donors, *National Journal* (June 16, 2011) available at <http://www.nationaljournal.com/hotline/campaign-law-watch/fec-asks-crossroads-to-reveal-donors-20110616>.

Commission's mistake into "evidence" of an alleged knowing and willful (*i.e.*, criminal) violation of the law.

E. American Crossroads vs. Crossroads GPS

American Crossroads and Crossroads GPS are legally separate organizations. Nearly all of the specific material to which CREW cites in its Complaint refers to "American Crossroads" fundraising and "American Crossroads" efforts, yet CREW's complaint is lodged against Crossroads GPS. CREW attempts to gloss over the distinction with the claim that "While Mr. Law and Mr. Barbour *apparently* used the name 'American Crossroads' in their fundraising pitches, ... they *evidently* used it to mean both American Crossroads and Crossroads GPS." Complaint at ¶ 30 (emphasis added). This is pure speculation on CREW's part, and it is both apparent and evident that CREW has absolutely no personal knowledge of what Mr. Law or Mr. Barbour said or intended.

The author of the two articles which serve as the sole basis of CREW's Complaint acknowledged in her interview with *Democracy Now!* that American Crossroads and Crossroads GPS are separate organizations. While Ms. Kolhatkar offered her own (incorrect) opinion that the two organizations share very similar missions, she nevertheless clearly understood that there are two organizations and she distinguished between them in her reports. Thus, there is absolutely no reason to pretend – as CREW does – that either Ms. Kolhatkar or Messrs. Law, Rove, and Barbour, carelessly used the term "American Crossroads" as some sort of catch-all phrase that encompasses both groups.

The news articles written by Ms. Kolhatkar on which CREW relies indicate that Mr. Law and Mr. Barbour made separate, general solicitations of funds for American Crossroads, and *not* Crossroads GPS. This is entirely consistent with the fact that the August 30 meeting was hosted by American Crossroads. Based on these facts and Ms. Kolhatkar's acknowledged awareness of the separateness of the two organizations, the most reasonable conclusion to draw is that Mr. Law and Mr. Barbour actually meant what they said and solicited funds specifically for American Crossroads. Thus, to the extent that CREW's complaint pretends that attendees were orally solicited for contributions to Crossroads GPS, *see, e.g.*, Complaint "Count IV", the evidence does not support that claim.

IV. Application of 11 C.F.R. § 109.10(e)(1)(vi)

A. History of the Regulation

Central to this matter is the proper application of 11 C.F.R. § 109.10(e)(1)(vi), which requires that persons other than political committees disclose on independent expenditure reports “the identification of each person who made a contribution in excess of \$200 to the person filing such report, *which contribution was made for the purpose of furthering the reported independent expenditure*” (emphasis added). This regulation was adopted in 1980 and has not been substantively modified since then.⁶ The 1980 Explanation and Justification indicates that “[t]his section has been amended to incorporate the changes set forth at 2 USC 434(c)(1) and (2) regarding reporting requirements for persons, other than a political committee, who make independent expenditures.” Final Rules On Amendments to Federal Election Campaign Act of 1971, 45 Fed. Reg. 15,080, 15,087 (March 7, 1980).

B. CREW’s Suggestion That The Regulation Does Not “Give Full Effect” To The Act Is Irrelevant

In what is obviously a suggestion that the Commission should disregard the plain language of a regulation that has existed for over 30 years, CREW claims:

The FEC’s interpretation of the statute [2 U.S.C. § 434(c)(2)(C)] fails to give full effect to these provisions. At a minimum, the statute requires identification of persons who made contributions “for the purpose of furthering *an* independent expenditure,” but the regulation only requires identification of persons who made contributions “for the purpose of furthering *the* reported independent expenditure.”

Complaint at ¶ 16 n.1. This argument is entirely irrelevant in an enforcement context. To read the reporting requirement set forth at 11 C.F.R. § 109.10(e)(1)(vi) as CREW suggests – which would apply a very different substantive standard – would require a formal rulemaking to amend the regulation. The FEC cannot conduct a rulemaking exercise under the guise of an enforcement matter, or otherwise disregard the language of a duly-enacted, longstanding regulation. One should *not* simply accept CREW’s argument that the statute and corresponding regulation are inconsistent, or that the regulation does not adequately reflect Congressional intent. To do so is to conclude that CREW’s self-serving reading of the 1979 Amendments to

⁶ Prior to the BCRA-era revisions to the Commission’s regulations, this provision was located at 11 C.F.R. § 109.2(a)(1)(vi).

the Act, 33 years later, is somehow more “correct” than the Commission’s essentially contemporaneous interpretation of those Amendments in 1980.

C. Operation of the Existing Regulation

In a recent enforcement matter, three Commissioners explained that under Section 109.10(e)(1)(vi), “a donation must be itemized on a non-political committee’s independent expenditure report only if such donation is made for the purpose of paying for the communication *that is the subject of the report.*” Statement of Reasons of Chairman Petersen and Commissioners Hunter and McGahn in MUR 6002 (Freedom’s Watch, Inc.) at 5. *See also* Findings of Fact in *SpeechNow.org v. FEC*, 2009 U.S. Dist. LEXIS 89011 (D.D.C. Sept. 28, 2009) at 22 (“52. Because SpeechNow does not accept any targeted or ‘earmarked’ funds, it need only disclose all of its contributors who provided money ‘for the purpose of furthering’ its independent expenditures. Keating Decl. at P 36; 2 U.S.C. 434(c)(2)(C). For each independent expenditure SpeechNow were to make, SpeechNow would have to disclose all donors whose contributions were given for such purpose and were used to fund any portion of the independent expenditure at issue. *Id.*”).

The professional campaign finance “reform” industry, with Representative Van Hollen serving as the named filer, recently submitted a petition for rulemaking to revise 11 C.F.R. § 109.10(e)(1)(vi). Even those who make their living as the FEC’s greatest detractors recognize that the regulation can only be revised via the formal rulemaking process. In their rulemaking petition, the “reform” lobby describes Section 109.10(e)(1)(vi) as requiring “disclosure only of those contributors who state a specific intent to fund a specific (‘the reported’) independent expenditure.” Rep. Van Hollen Petition for Rulemaking to Revise and Amend Regulations Relating to Disclosure of Independent Expenditures (April 21, 2011) at 3. Furthermore, the petition explains, “under the regulation, all contributions to the person making the independent expenditure that were not given for the *specific purpose of furthering the specific reported independent expenditure* are not required to be disclosed.” *Id.* (emphasis in original). The petitioners also note:

Under present-day 11 C.F.R. § 109.10(e)(1)(vi), even if a contributor gave money to a person making independent expenditures with knowledge that the contributed funds would be used for independent expenditures, and specifically intended that the funds be used for that purpose, the contribution would still not be subject to disclosure under the regulation unless the contributor intended that the funds be earmarked and used for a specific independent expenditure.

Id. at 4.

While the existing regulation may be unpopular in some quarters at the moment, due to circumstances that changed decades after the regulation was adopted, there appears to be broad agreement across the spectrum with respect to what the existing regulation says, and how it operates in practice.

D. Donative Intent

As noted, the critical elements of Section 109.10(e)(1)(vi) are (1) the intent of the donor in making a contribution, and (2) the specificity of that intent. To the extent that any of the donors referenced in CREW's complaint actually made contributions to Crossroads GPS, CREW's various characterizations of their donative intent(s) should not be accepted by the Commission as fact. CREW has no personal knowledge of any of these matters. Rather, any conclusions drawn by the Commission regarding the intent of any donors referenced in the Complaint must be drawn from the actual evidence presented, and not from CREW's self-serving legal conclusions.

Counts I, II, and III of CREW's complaint are based entirely on a brief passage from Ms. Kolhatkar's September 4, 2012, article, and her September 5 interview on *Democracy Now!*. All that CREW really knows about the supposed intent of the "unnamed out-of-state donor" – notwithstanding its sworn assertions that go well beyond this evidence – comes exclusively from these two sources.

As explained above, CREW's "factual" claims about this supposed series of transactions are badly flawed. The passage that appeared in *Bloomberg BusinessWeek* indicates that the contribution was *not* made for the purpose of funding any particular advertisements. Rather, to the extent the donor's intent is described at all, the evidence indicates that the funds were intended as a general grant for use in Ohio. In the *Democracy Now!* interview, Ms. Kolhatkar's recounting indicates that the donor's intent was described as an intention to "donate half of their \$6 million budget in the state." Again, nothing here demonstrates that any contribution was made for the purpose of funding any particular advertisements, advertisements in general, or that the donor had any knowledge of any particular Crossroads GPS efforts.

As noted above, the independent expenditures that Crossroads GPS reported making in connection with the 2012 Ohio Senate race were developed *well after* the conversation recounted in the *Bloomberg BusinessWeek* article and at ¶ 23 of the Complaint took place in Spring 2012. There is also no evidence – and CREW does not suggest – that this "unnamed donor" and Mr. Rove discussed or otherwise developed advertisements during their conversation. In short, there is no evidence and no suggestion that the unnamed donor "exercised control over how his [or her] contribution was spent." Statement of Reasons of Vice Chair Bauerly and Commissioner

Weintraub in MUR 6002 (Freedom's Watch, Inc.) at 2, 4. Accordingly, this donor could not possibly have had the requisite and specific intent to finance the advertisements that Crossroads GPS subsequently created, aired, and reported.

Furthermore, as Mr. Rove attests, the "unnamed donor" never made a single contribution in the amount of \$3 million. Rather, that donor made a larger contribution that was not earmarked in any way.

There is no basis to conclude, and CREW points to no actual evidence indicating, that Crossroads GPS financed *any* reported independent expenditure "in whole or in part with funds donated for the purpose of furthering that particular advertisement." CREW's "information and belief" is not actual evidence – it is speculation and wishful thinking. There is no evidence presented in the Complaint (or anywhere else) that Crossroads GPS solicited or received funds for even the general purpose of making independent expenditures. At best, CREW's complaint lazily regurgitates a news articles that shows that an "unnamed donor" discussed providing funds for general use in a specified state. Far more specificity is required before Section 109.10(e)(1)(vi) is triggered.

Nor is there is any evidence of any subsequent actions or events from which information regarding donative intent might conceivably be gleaned. Specifically, there is no information indicating that any particular donor "parcel[led] out his money project by project," "rejected almost all of the staff's proposals that have been brought to him," or otherwise "exercised control over how his contribution was spent." Statement of Reasons of Vice Chair Bauerly and Commissioner Weintraub in MUR 6002 (Freedom's Watch, Inc.) at 2, 4.

V. Discussion of Legal Matters Raised In Complaint

A. Complaint "Count I"

"Count I" asserts that an individual made \$3 million in contributions to Crossroads GPS that should have been disclosed on corresponding independent expenditure reports. The donor's supposed intent is described several different ways:

- Paragraph 37 asserts that this person "made \$3 million in contributions for the purpose of furthering the independent expenditures Crossroads GPS made in the Ohio Senate race."
- Paragraph 38 asserts that this person "told Mr. Rove he was giving Crossroads GPS \$3 million to spend on the Ohio Senate election between Sen. Brown and

Mr. Mandel. The donor further said the contribution was a 'matching challenge' to meet Crossroads GPS's \$6 million budget for the state."

- In Paragraph 39, CREW alleges, "on information and belief," that "Crossroads GPS received \$3 million from the unnamed donor who contributed the money with the intent that it be spent on the Ohio Senate race."
- Paragraph 41 alleges that Crossroads GPS's independent expenditure reports failed to identify the person "who made \$3 million in contributions for the purpose of furthering those independent expenditures."
- Paragraph 42 alleges that Crossroads GPS "received \$3 million in contributions from the unnamed donor for the purpose of furthering the reported independent expenditures in the Ohio Senate race."

Contributions are reportable under Section 109.10(e)(1)(vi) only if the donor made the contribution "*for the purpose of furthering the reported independent expenditure.*" To the extent that CREW's various characterizations attempt to assert a standard different from the one set forth at Section 109.10(e)(1)(iv), those allegations should be ignored and dismissed. The Commission could also reasonably conclude from CREW's varying descriptions of the donor's intent that CREW knows nothing about the subject.

1. Complaint ¶ 37

The donor referenced in Paragraph 37 of the Complaint did not actually make a single contribution in the amount of \$3 million. Rather, the donor contributed a larger amount that was not earmarked in any way.

Paragraph 37 of the Complaint alleges that "Crossroads GPS knowingly and willfully failed to identify the person who made \$3 million in contributions *for the purpose of furthering the independent expenditures Crossroads GPS made in the Ohio Senate race.*" Complaint at ¶ 37 (emphasis added). As noted above, there is no evidence of any such intent. Even assuming for the sake of argument that the donor actually did contribute to Crossroads GPS "*for the purpose of furthering the independent expenditures Crossroads GPS made in the Ohio Senate race,*" that donative intent would create a reporting obligation under 11 C.F.R. § 109.10(e)(1)(iv) *only if* the donor had specific knowledge of the actual independent expenditures referenced. Here, this is not possible. The advertisements that CREW erroneously alleges the donor funded were not created until well after the contributor donated the funds at issue. The contributor had no creative discussions with any representative of Crossroads GPS about these independent expenditures.

In other words, this donor played no role whatsoever in developing, creating, or funding any specific independent expenditure – rather, the donor simply *pledged* funds to be spent *somehow* in connection with the Ohio Senate race, and later made a larger donation with no strings attached. Even if we assume that the \$3 million pledged earlier was subsumed within the larger donation made, Crossroads GPS was free to spend that amount in any way it wished so long as it *somehow* aided in the election of Josh Mandel. This general “purpose” does not create any reporting obligation under 11 C.F.R. §109.10(e)(1)(vi).

If Crossroads GPS had received a donation or contribution from a person, “which contribution was made for the purpose of furthering the reported independent expenditure,” *then* Crossroads GPS *would have* reported it as required by FEC regulations. However, no such contribution was made for such purpose, and accordingly, Crossroads GPS was not required to make any corresponding donor disclosure.

2. Complaint ¶¶ 38 – 42

Paragraphs 38-42 of the Complaint purportedly provide the factual basis for CREW’s Count I allegation. The Complaint, however, simply assumes the facts not in evidence that CREW believes *would be* necessary to show the violation alleged. CREW substitutes its own legal conclusions and “information and belief” as “facts” and plants them into a restatement of the regulatory provision it claims was violated.

For example, at Paragraph 38, CREW claims that “[a]n unnamed donor told Mr. Rove he was giving Crossroads GPS \$3 million to spend on the Ohio Senate election between Sen. Brown and Mr. Mandel.” This is decidedly *not* what this “unnamed donor told Mr. Rove.” Mr. Rove’s recounting of what this donor said to him is set forth in the Complaint at Paragraph 23.

At Paragraph 42, CREW goes a step further and fabricates a key piece of information it believes is necessary to establish a violation. CREW claims that Crossroads GPS “received \$3 million in contributions from the unnamed donor *for the purpose of furthering the reported independent expenditures in the Ohio Senate race*” (emphasis added). First, as explained above, Crossroads GPS never received a single contribution in the amount of \$3 million from this donor. Second, there is absolutely no evidence in support of CREW’s concocted assertions regarding the donor’s purported intent or purpose. The disconnect between the vague recounting of a conversation paraphrased in a news account and the specificity of CREW’s allegation is readily apparent. The news report indicates that a donor reportedly said, “I really like Josh Mandel,” asked the size of a state budget, and said “I’ll give ya \$3 million, matching challenge. From this, CREW concludes, in a sworn complaint no less, that this donor contributed “*for the purpose of furthering the reported independent expenditures in the Ohio Senate race.*” Aside

from the obvious impossibility of CREW knowing anything about this particular individual's specific donative intent, it is also worth noting that "the reported independent expenditures" had not even been conceived at the time the donor made this statement.

B. Complaint "Count II"

In "Count II," CREW refers to donors about whom it knows next to nothing, and maintains that there are one or more donors out there somewhere who contributed a combined \$3 million to Crossroads GPS. Simply put, there was no "\$3 million in 'matching' contributions." As explained above, one or more donors contributed a total of approximately \$1.3 million in connection with the Ohio matching program.

As is the case in "Count I," the intent of these unknown donors is described several different ways.

- In Paragraph 43, CREW refers to "the persons who made \$3 million in 'matching' contributions for the purpose of furthering the independent expenditures Crossroads GPS made in the Ohio Senate race."
- Paragraph 44 claims that "[a]s of August 30, 2012, Crossroads GPS was in the process of soliciting 'the other' \$3 million in contributions for spending in the Ohio Senate election."
- In Paragraph 45, on CREW's "information and belief," "Crossroads GPS solicited and received \$3 million in contributions from donors given with the intention that the money be spent on the Ohio Senate race."
- Paragraph 47 refers to "the persons who made \$3 million in contributions as part of the 'matching challenge' for the purpose of furthering those independent expenditures."
- Finally, in Paragraph 48, CREW claims that "Crossroads GPS had received \$3 million in contributions as part of the 'matching challenge' from donors for the purpose of furthering the reported independent expenditures in the Ohio Senate race."

Based on the evidence presented and the Complaint itself, it is obvious that CREW has no idea who these alleged donors might have been, how many there were, how much any of them gave individually, when they made these alleged contributions, or why they contributed. However, CREW is certain that they gave "*for the purpose of furthering the reported independent expenditures in the Ohio Senate race.*" There is no evidence presented to support this conclusion, and CREW has no relevant personal knowledge.

Where a complainant cannot provide credible details regarding “who,” “what,” and “when,” it certainly cannot be relied upon to provide the “why.” The allegations are not adequately substantiated under the “reason to believe” standard set forth in MUR 4960 (Hillary Clinton) and amount to “purely speculative charges ... [that] do not form an adequate basis to find reason to believe that a violation of the FECA has occurred.” Statement of Reasons of Commissioners Mason, Sandstrom, Smith, and Thomas in MUR 4960 (Hillary Clinton). Furthermore, CREW’s assertions regarding the specific intent of donors about which nothing else is known are so obviously fabricated that Ms. Sloan and Ms. Markley almost certainly falsely swore to the Verifications submitted with this Complaint. The rote prefacing of an assertion with the hedge “on information and belief” does not create a license to lie.

“Count II” of the Complaint alleges that “Crossroads GPS knowingly and willfully failed to identify the persons who made \$3 million in ‘matching’ contributions for the purpose of furthering the independent expenditures Crossroads GPS made in the Ohio Senate race.” Complaint at ¶ 43; *see also* Complaint at ¶ 47. As explained above, there are no “persons who made \$3 million in ‘matching’ contributions for the purpose of furthering the independent expenditures Crossroads GPS made in the Ohio Senate race,” meaning Crossroads GPS could not possibly have “knowingly and willfully failed to identify” them.

The donors who contributed approximately \$1.3 million in connection with the matching program did not make those contributions “for the purpose of furthering the independent expenditures Crossroads GPS made in the Ohio Senate race.” There is no evidence presented regarding any donor’s intent. However, any funds solicited or received by Crossroads GPS in connection with the matching program were limited for subsequent use only to the extent that donors expected the funds would be spent *somehow* in Ohio.

C. Complaint “Count III”

Complaint “Count III” asserts a “conspiracy” to “violate the FECA and defraud the FEC by knowingly and willfully failing to identify” the donors/contributions referenced in Counts I and II. Complaint at ¶ 49. This allegation is presumably targeted to the FBI (and the media), as the Commission does not enforce 18 U.S.C. § 371. Nevertheless, the “facts” on which CREW premises its Counts I and II are badly flawed, and CREW presents no evidence of any wrongdoing or of any violation of the Act or Commission regulations. There can be no “conspiracy” to “violate the FECA” where there is no violation of FECA.

Messrs. Rove, Law, and Crosby **did not** “unlawfully conspire[] to violate the FECA and defraud the FEC.” *See* Complaint at ¶ 49. Nor did they “knowingly enter[] into an unlawful agreement to intentionally violate 2 U.S.C. § 434 and 11 C.F.R. §§ 109.10(b) – (e) and to defraud the FEC by failing to identify the person who made \$3 million in contributions for the

purpose of furthering the independent expenditures Crossroads GPS made in the Ohio Senate race, and by failing to identify the persons who made \$3 million in 'matching' contributions for the purpose of furthering those independent expenditures." See Complaint at ¶ 50. Neither Mr. Crosby, nor Mr. Law, nor Mr. Rove "committed overt acts to effect the object of the conspiracy in violation of 18 U.S.C. § 371," nor "caused others to commit overt acts to effect" the same. See Complaint ¶¶ 51-53.

D. Complaint "Count IV"

The allegations contained in "Count IV" of the Complaint should be dismissed outright. CREW alleges that "Crossroads GPS knowingly and willfully failed to identify the persons who made contributions for the purpose of broadcasting the advertisements shown at the August 30, 2012 fundraiser or broadcasting other ads in those races." Complaint at ¶ 54. On CREW's "information and belief, Crossroads GPS received contributions given with the intention that the money be spent on independent expenditures broadcasting the advertisements shown at the fundraiser or broadcasting other ads in the Ohio, Virginia, Montana, and Nevada Senate races." Complaint at ¶ 56.

As noted above, the materials on which these particular allegations rest (*i.e.*, Sheelah Kolhatkar's August 30 article) indicate that towards the end of the August 30 meeting, Mr. Law and Mr. Barbour made separate, general solicitations of funds for *American Crossroads*, not Crossroads GPS.

Once again, the advertisements that were screened for attendees at the August 30 meeting were *not* screened for the purpose of seeking funding for them. Thirteen of fourteen ads had already been paid for and aired, and the fourteenth advertisement was never intended for public distribution. As a basic factual matter, no attendee *could have* contributed "for the purpose of broadcasting the advertisements shown at the August 30, 2012 fundraiser." In addition, the Complainant has presented no evidence whatsoever indicating that anyone in attendance actually made a contribution following the August 30 meeting, let alone made a contribution "for the purpose of ... broadcasting other ads in those races." To the extent CREW's allegations in "Count IV" are even a factual possibility, those allegations are "purely speculative" and should be dismissed pursuant to the Statement of Reasons in MUR 4960 (Hillary Clinton) ("purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find reason to believe that a violation of the FECA has occurred").

The allegations in "Count IV" that are not precluded as a basic factual matter amount to: "*if* someone in attendance at the August 30 meeting subsequently made a contribution to Crossroads GPS, and *if* that contribution was made "for the purpose of broadcasting ... other ads

in the Ohio, Virginia, Montana, and Nevada Senate races,” *then* that person should have been reported on a Crossroads GPS report, and Crossroads GPS ‘knowingly and willfully’ failed to do so.” There is no evidence for either of these “ifs,” and the alleged donative purpose does not create a disclosure requirement under Section 109.10(e)(1)(vi). At a minimum, a donor who is subject to disclosure under Section 109.10(e)(1)(vi) must know what advertisement he or she is funding. A donation made for the far more general purpose of funding unspecified advertisements to be broadcast in a handful of states at some later date does not satisfy the requirement that the contribution be made “for the purpose of furthering *the reported independent expenditure.*” Here, CREW simply engages in baseless speculation in the hopes the Commission will undertake an investigation.

Nevertheless, Crossroads GPS **did not** solicit or receive, at any time, any contributions “for the purpose of ... broadcasting other ads in those races.”

E. Complaint “Count V”

Finally, Complaint “Count V” asserts a “conspiracy” to “defraud the FEC by knowingly and willfully failing to identify” the donors/contributions referenced in “Count IV.” Complaint at ¶ 59. Like “Count III,” “Count V” and its allegations based on 18 U.S.C. § 371, are presumably targeted to the FBI and the media. As explained above, “Count IV” does not identify any violation of the Act or Commission regulations or present any evidence of any “conspiracy” to violate any law.

VI. Conclusion

For the reasons set forth above, CREW’s complaint should be dismissed because it fails to satisfy the standards set forth in MUR 4960 (Clinton). Alternatively, the Commission should

find no reason to believe a violation of the Act occurred. In addition, Ms. Sloan and Ms. Markley should be referred to the appropriate authorities for investigation into whether they executed false Verifications in connection with the submitted Complaint.

Sincerely,



Thomas J. Josefiak

Michael Bayes

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Haley Barbour, Steven Law, and Caleb
Crosby